

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2015

Public Authority: The Department for Education (DfE)

Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant requested information about academies/free schools who have changed sponsors or moved from one academy chain to another. The DfE provided some information but withheld details of the costs involved under sections 36(2)(c) and 43(2) of the FOIA. The Commissioner's decision is that the DfE has correctly applied section 36(2)(c) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 2 December 2014, the complainant wrote to the DfE and requested information in the following terms:

"I should be grateful if you could send me the names of academies/free schools which have changed sponsors or moved from one academy chain to another from 1 September 2013 to 31 October 2014. The list should include the names of previous sponsors/chains and new sponsors/chains.

I should also be grateful if you could let me know how much money was given to the sponsors/academy chains to help with transition eg start-up grants, money for legalities etc".

3. The DfE responded on 24 December 2014 and provided some information relevant to the request but withheld information relating to the costs involved under section 43 of the FOIA.
4. On 30 December 2014 the complainant requested an internal review of the DfE's decision to withhold information relevant to her request under section 43 of the FOIA.
5. The DfE provided the outcome of its internal review on 2 February 2015 and upheld its decision that information relating to the costs involved was exempt under section 43 of the FOIA. The DfE stated that it also considered the exemption at section 36(2)(c) to apply to the withheld information.

Scope of the case

6. The complainant contacted the Commissioner on 3 February 2015 to complain about the way her request for information had been handled.
7. The scope of the Commissioner's investigation into this complaint is to determine whether the DfE should disclose the remaining information held relevant to the request.

Reasons for decision

Background

8. The DfE provided the Commissioner with background information about academies and re-brokering arrangements to assist in his investigation.
9. Academies are state funded schools that operate independently from local government and receive funding through funding agreements with the Secretary of State for Education. There are two main types of academy – sponsored, and converters. There is also a smaller group of schools that fall under the umbrella category of 'academy', though are often considered separately, these are: free schools, university technical colleges and studio schools.
10. Sponsored academies are usually previously underperforming schools that had failed under local authority supervision. These academies have been found a sponsor to take over running them. The sponsor is responsible for setting up the academy trust, the performance and finances of their school(s), selecting the governing body and recruiting the head teacher. Sponsors are typically high performing schools, universities, businesses, education foundations, faith communities or

charities. Sponsors' involvement with schools is philanthropic; they cannot make a profit from their relationship with the school. Converters are typically previously outstanding or good maintained schools that chose to become academies to gain freedoms to further innovate and raise standards for their pupils. Converters do not require a sponsor. Both types of academy require an academy trust to be set up.

11. Where an academy or free school is not proving successful with its current sponsor, the DfE will intervene to improve the school. The DfE's policy objective is to develop a self-improving, school-led system, in which schools (and other organisations) support other schools to improve. In cases of underperformance, moving an academy or free school to a new or stronger sponsor is one of the most robust intervention tools the DfE has for tackling underperformance in academies. Changes of sponsor or chain, for underperformance or for other reasons, are the changes referred to in the request and are known internally within the DfE as 'rebrokerage' (brokerage agreement with a new sponsor to run the school).
12. The DfE confirmed that currently there are no set costs or payments made to a school or sponsor as a result of rebrokerage. Payments associated with rebrokerage are decided on a case by case basis and are not published. Funding is only provided where there is evidence that it is required according to the context of the school. This includes considering whether it can be funded from within the school's existing budget.
13. Getting the right new sponsor has the potential to turn a failing academy around and to transform the education the school's pupils receive. Achieving this relies on a delicate negotiation with potential sponsors, both to persuade them to take on the school and to agree the support (financial or otherwise) that they will need to make improvements for pupils. This negotiation is delicate because these schools will often be in the most challenging of circumstances – in which another sponsor has already struggled to achieve a sustained improvement.

Section 36 – prejudice to the effective conduct of public affairs

14. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.

15. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the DfE confirmed that the opinion was given by the Parliamentary Under Secretary of State for Education and Childcare, Sam Gyimah on 30 January 2015. The DfE also confirmed that the qualified person had access to all relevant material including a description of the withheld information. A copy of the submission to the qualified person and the qualified opinion was provided to the Commissioner. The qualified person effectively subscribed to the arguments included in the submission – accepting that it would be likely the prejudice described in sections 36(2)(c) would occur through disclosure. While the level of prejudice designated by 'would be likely' is lower than the alternative threshold 'would' prejudice, it nevertheless still requires that there is a real and significant risk of prejudice occurring.
16. The Commissioner is satisfied that Sam Gyimah was an appropriate qualified person for the purpose of section 36 of the FOIA. As the Commissioner is satisfied that the opinion is the opinion of an appropriate qualified person for the DfE, he now needs to consider whether that opinion is reasonable. It is important to highlight at this point that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold.
17. The Commissioner has reviewed the withheld information, the submissions he received from the DfE and the information that was given to the qualified person in order for him to reach his opinion.
18. In relation to the application of section 36(2)(c), the DfE confirmed that the qualified person agreed that this exemption was engaged in this case for the following reasons:
 - a. The withheld information covers early rebrokerage projects, some of which have very specific circumstances. The DfE considers that disclosure of the withheld information is likely to set unreasonable expectations of the sums that potential sponsors may receive by taking on a failing school, which the DfE will be unable to offer. DfE explained that the starting position is that sponsors should have no expectation or funding in circumstances involving re-brokering. Disclosure would be likely to lead to reluctance in sponsors taking on schools believing they have been made an unfair offer. This in turn would undermine

the effective operation of the academies system which depends on the availability and willingness of suitable sponsors.

- b. Disclosure would be likely to lead to sponsors believing that a precedent had been set and similar information will be released in the future. Specific aspects of the grants have the potential to release harmful or sensitive information, for example relating to severance packages. This could undermine the DfE's ability to recruit sponsors, which would in turn prejudice the effective management of the academies system.
 - c. There is considerable variation in the amounts contained within the withheld information. Previously agreed funding levels have been allocated on the basis of need. Without a detailed understanding of the context, the specific circumstances of each case will not be apparent. Disclosure could be taken out of context and "distort behaviour away from the philanthropic purpose of the system". This would prejudice the DfE's ability to continue to operate the market in line with its policy objectives.
19. Based on the submission to the qualified person and the requested information, the Commissioner considers that there is a real and significant risk that disclosure would be detrimental to the effective management of the academies system and the DfE's ability to re-broker failing academies. The Commissioner accepts that the qualified person could reasonably regard that as prejudicing the effective conduct of public affairs. The Commissioner therefore finds that the exemption at section 36(2)(c)(i) was correctly engaged in respect of the withheld information.

The public interest test

20. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs the concerns identified by the qualified person. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the qualified person, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.

Public interest arguments in favour of disclosure

21. The DfE acknowledges that there is a general public interest in disclosure in terms of open and transparent government and the sharing of information with the public should be free and open.

22. The DfE also recognises there is a public interest in ensuring that public money is being used appropriately when academies and free schools change sponsor.
23. The complainant asserts that it is in the public interest to reveal how much public money has been spent on re-brokering. She also considers that a precedent has been set as the amount received by academy trusts for 'start up' grants is in the public domain.

Public interest arguments in favour of maintaining the exemption

24. The DfE is of the view that the prejudice it has identified in disclosure of the information is exacerbated by the relative immaturity of the academies system. The pace of education reform has resulted in a system that is still developing and new pieces of information or high-profile cases can influence the behaviours of individuals considerably and change the dynamics and effectiveness of the system.
25. Sponsors are crucial to the effective conduct of the schools system and their expectations of the DfE and their understanding of their role as the system continues to develop is particularly vulnerable to small signals or developments. The relationship between the DfE and current or potential sponsors is an ongoing one and the DfE considers that disclosure would hinder its ability to negotiate effectively with sponsors to move an academy or free school from one sponsor to another, and thus adversely affect its ability to intervene in underperforming academies. This will ultimately damage the improvements in such schools and the quality of education on offer to their pupils. This would clearly not be in the public interest.
26. The DfE explained that academy trusts are required to publish their accounts on their websites, and this includes any sums paid to them as part of re-brokering. However, the information would not be in the format requested in this case and it is not usually possible to determine which payments were specifically made for re-brokerage. In order to respond to the request, the DfE was able to compile the information requested for the 23 academies that had transferred from one chain or sponsor to another. Given the numbers involved, the DfE was able to look at individual payment records and with reference to records of discussions and decisions taken, establish which payments were made to help with the transition to a new sponsor.

Balance of the public interest test

27. The Commissioner agrees with the DfE that there is a public interest in openness and transparency. In his view this is particularly so in this case, given the context of the debate surrounding the effectiveness of

academy schools and their sponsors. Clearly difficult decisions have had to be made about transferring schools that are in very challenging circumstances to new sponsors. In such circumstances the Commissioner considers that there is a strong public interest in disclosing the details of the cost to the public purse of re-brokering those sponsorship arrangements. This would allow the public, including those directly impacted, to better understand the decisions that have been taken.

28. The Commissioner accepts the DfE's argument regarding the relative immaturity of the academies system in support of the public interest in maintaining the exemption. However, he takes the view that this fact equally lends weight to the arguments in favour of disclosure. Given that the system is still in its relative infancy, details of the costs associated with re-brokering would further inform the ongoing debate about the efficiency and effectiveness of the system at time where there is scope to influence how it might be further developed.
29. The Commissioner notes the complainant's point that information about start up grants made to academies is published. In response to this the DfE confirmed that it publishes information about start-up grants and ongoing funding available to sponsored and converter academies. These schools receive a start-up grant to help with the initial costs of becoming an academy. The published information does not set out case specific information but sets out fixed grant levels and outlines the criteria against which they are awarded. By contrast, there are no set funding amounts for academies or free schools moving from one sponsor to another – any such costs are considered in the context of the school's specific circumstances and decisions about meeting them are made on a case-by-case basis. Once open, academies (including special academies) receive the same funding as maintained schools for every pupil on the register. They also receive extra funding to cover the cost of services that used to be provided by the local authority. In view of the DfE's response to this point, the Commissioner does not accept that a precedent has been set as a result of start-up grant figures being published given the different context of those disclosures and he has not afforded any weight to this argument.
30. Whilst the arguments in favour of disclosure in this case are strong the Commissioner nevertheless recognises that there is a very strong public interest in the DfE being able to negotiate effectively with potential sponsors, particular in the case of re-brokering arrangements in respect of underperforming academies. The Commissioner appreciates that getting the right sponsor for a failing academy would involve a delicate negotiation process as the schools will be experiencing challenging circumstances in light of a sponsor having struggled to attain sustained improvements. He therefore accepts that the prejudice to the process is

likely to be significant and will not only undermine the management of the academy process but will have a damaging effect on improvements in underperforming academies and the quality of education provided to pupils.

31. Having accepted the opinion of the qualified person as reasonable in this case, the Commissioner recognises that this inhibition and prejudice would be likely to occur with some frequency. He notes that 23 academies have changed sponsors in the period from 1 September 2013 to 31 October 2014. Whilst the argument about the immaturity of the academies system is relevant to the weight of arguments both for and against disclosure the Commissioner has ultimately concluded that the significance and the frequency of the prejudice tips the public interest balance in favour of maintaining the exemption in this case. Therefore, the Commissioner has concluded that the DfE was correct to refuse the request on the basis that the section 36(2)(c) exemption applied.
32. As the Commissioner finds that the information was correctly withheld under section 36(2)(c), he has not gone on to consider the DfE's application of section 43 to the withheld information.

Right of appeal

33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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